No. 86-1627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF ANGOON, *et al.*,

Petitioners,

v.

DONALD HODEL, Secretary of the Interior, *et al.*,
SHEE ATIKA, INC., and SEALASKA CORPORATION,

Respondents.

BRIEF OF SEALASKA CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to determine whether the federal government's navigational servitude over State of Alaska waters constitutes "public lands" under §810 of the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C.A. §3120(a).

2. Should this Court grant certiorari to determine whether the phrase "within the monument" in §503(d) of ANILCA includes private inholdings that are not a part of the monument.

3. Should this Court grant certiorari to determine whether the court of appeals, under the particular facts of this case, properly directed the entry of summary judgment for appellant Shee Atika, Inc., on the basis of Shee Atika's cross motion below.

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STATEMENT OF THE CASE

This case involves three issues and three respondents. Respondent Sealaska Corporation[1] is confining its brief to the third issue—the propriety of the court of appeals' directed entry of summary judgment for appellant Shee Atika, Inc., on the basis of Shee Atika's cross motion in the trial court.[2] The following statement is limited to that issue.

On November 9, 1984 the U.S. Army Corps of Engineers prepared a final environmental impact statement ("FEIS") on a log transfer facility to be built by Shee Atika at Cube Cove on its privately-owned Admiralty Island lands.[3]

On March 4, 1985, the district court consolidated the four individual cases involved in this litigation and ordered Sierra Club/Angoon to file an amended consolidated complaint. The amended complaint was filed on April 3, 1985. E.R. 00001 *et seq.* In the amended complaint, Sierra Club/Angoon alleged that the federal permits issued to Shee Atika violated NEPA. *Id.* at 00014. The complaint specified, however, only one alleged insufficiency in the FEIS—the Corps' failure to study the alternative of coercing Shee Atika into

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[1] Sealaska Corporation is the Alaska Native regional corporation for Southeast Alaska formed pursuant to the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C.A. §1601 *et seq.*

[2] Sealaska adopts the briefs of the federal respondents and Shee Atika, Inc., with regard to the remaining issues raised by this petition.

[3] Court of Appeals Excerpts of Record ("E.R.") at 00136-00324. The facility required a permit from the Corps under §404 of the Clean Water Act (33 U.S.C.A §1344) and §10 of the River and Harbors Appropriations Act of 1899 (33 U.S.C.A. §403).

exchanging its Cube Cove lands for other lands elsewhere. *Id.* The complaint then went on, in catchall fashion, to say that the federal permits were "otherwise [issued] without complying to the fullest extent possible with NEPA . . .." *Id.*

The parties filed motions and cross-motions for summary judgment, or dismissal, covering every issue raised by the consolidated complaint.[4] As to the NEPA claims, Sierra Club/Angoon moved for partial summary judgment only on the "exchange alternative" issue. E.R. 00116. In its dispositive motion, however, Shee Atika sought dismissal *both* of the specific "exchange alternative" NEPA claim, and as well the catchall claims on the ground that conclusory allegations of NEPA violations were legally insufficient. *See* E.R. 00113.[5]

On May 21, 1985, responding to Shee Atika's dispositive motion, Sierra Club/Angoon devoted one sentence (out of a 33-page brief) to their undeveloped NEPA claims:

> Plaintiffs allege that the EIS is inadequate for other reasons as well, but until they have the opportunity for further factual development, including discovery, and further legal analysis, plaintiffs are not prepared to present their case on these points.

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[4] At this point, the district court proceedings became quite complex. From January, 1985, to issuance of the district court's NEPA Order (November 27, 1985), the parties filed *35* briefs on the merits. E.R. 378-83.

[5] On June 10, Shee Atika further opposed Sierra Club/Angoon's attempt to reserve "undefined, unarticulated NEPA arguments until some indeterminate time in the future."

Finally, on June 18, Sierra Club/Angoon filed an affidavit of counsel submitted under Federal Rule of Civil Procedure 56(f). That affidavit alleged that: (a) Sierra Club/Angoon were not then able to "present by affidavit facts essential to justify their opposition . . ." to Shee Atika's motion on the "other" NEPA claims; (b) they had not yet commenced any discovery on their undeveloped NEPA claims; and (c) believing that success on their exchange alternative issue would make other NEPA discovery unnecessary, they had opted to defer such discovery.[6]

On November 27, 1985, the district court issued its decision on the NEPA issue. The district court granted Sierra Club/Angoon's motion on the "exchange alternative" issue and denied Shee Atika's comprehensive motion. The court of appeals, exercising its plenary authority on summary judgment appeals, reversed both aspects of the ruling. Sierra Club/Angoon then moved to reconsider. Appendix B. The court of appeals denied that petition without opinion. Sierra Club/Angoon Petition for Certiorari, Appendix C.

REASONS WHY THE PETITION SHOULD BE DENIED

In directing the entry of summary judgment for Shee Atika on Sierra Club/Angoon's NEPA claims, the court of appeals acted within its authority to issue any order "as may be just under the circumstances." 28 U.S.C.A. §2106; *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 29 (1983). Its action did not offend this Court's ruling in *Foun-*

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[6] This affidavit is appended as Appendix A to this brief.

tain v. Filson, 336 U.S. 681 (1949), because *Fountain* is inapposite. There are, in addition, prudential reasons why the petition should be denied.

A. The court of appeals action does not conflict with Fountain v. Filson, and the only issue here is a factual one not warranting review

In *Fountain,* the court of appeals directed the entry of summary judgment on an issue that was *not* argued at the district court level. As a result, there was "no occasion in the trial court for Mrs. Fountain to dispute" the claim on which the Court of Appeals ruled. 336 U.S. at 683. The unremarkable holding of *Fountain* is that when a party has *never* had the opportunity to contest a claim, that claim ought not to be resolved against him.

Here, conversely, the issue of Shee Atika's entitlement to summary judgment on *all* of Sierra Club/Angoon's NEPA claims was fully litigated before the district court. Shee Atika moved for dismissal or summary judgment on Sierra Club/Angoon's entire complaint. Sierra Club/Angoon opposed Shee Atika's comprehensive motion by submitting an affidavit, pursuant to Federal Rule of Civil Procedure 56(f), asserting that other undeveloped NEPA issues remained, and that more time was needed. Appendix A.[7]

Because the district court granted Sierra Club/Angoon's cross-motion on the "exchange alternative" is-

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[7] Yes, Sierra Club/Angoon's defense of its "other" NEPA claim was meager—consisting of a footnote in one brief, a passing mention in another, and a cursory affidavit. Sierra Club/Angoon, however, had ample opportunity to do more if they wished.

sue, it did not deal with Sierra Club/Angoon's Rule 56(f) contentions. However, because the issue was actually litigated at the district court, "*Fountain v. Filson* is therefore inapposite." *Morgan Guaranty Trust Company of New York v. Martin*, 466 F.2d 593, 600 n. 10 (7th Cir. 1972). This petition involves no due process issue, since Sierra Club/Angoon have had their day in court. Rather, the only issue presented is the court of appeals' authority to direct the entry of summary judgment for an appellant. That authority, in turn, is established:

> On reversal an appellate court may, in a proper case, order that summary judgment be entered for the appellant, thus avoiding the necessity of further proceedings.

6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice*, ¶¶56.27(1) and (2) (2d ed. 1981); see also *Viger v. Commercial Insurance Company of Newark*, 707 F.2d 769 (3rd Cir. 1983); *Morgan Guaranty Trust Company of New York v. Martin*, 466 F.2d 593; *Stein v. Oshinsky*, 348 F.2d 999 (2nd Cir. 1965), *cert. denied* 382 U.S. 957 (1965).[8]

Application of this rule does not warrant review.[9] The issue is principally a factual one, and this Court

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[8] This Court has affirmed court of appeals' decisions granting summary judgment to appellants below. See, e.g., Kern County Land Company v. Occidental Petroleum Corp, 411 U.S. 582 (1973).

[9] While telling this Court that the court of appeals lacked authority to enter its order, Sierra Club/Angoon conceeded that authority in their rehearing petition, arguing only that the exercise of that authority was unwarranted under the peculiar facts of this case. *See* Appendix B.

does "not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

Moreover, the court of appeals had before it a district court record providing an ample factual basis for finally ending this controversy. The final EIS was issued a full year before the district court's decision; nonetheless, Sierra Club/Angoon remained unable to articulate a single "other" NEPA claim. Sierra Club/Angoon's demands for additional discovery were as vague as the "other" NEPA claims themselves. Their Rule 56(f) affidavit candidly admitted that they had purposefully done no discovery on their "other" NEPA claims so that they could present their challenges to the EIS seriatim. The token defense of their "other" NEPA claims suggested that Sierra Club/Angoon were less interested in preserving meritorious contentions, and more interested in prolonging a lawsuit then nearly three years old. Under these facts, it was proper for the court of appeals to "perceive no reason for not bringing this litigation to an end." *Stein v. Oshinsky*, 348 F.2d at 1002.

B. There are other prudential reasons for declining review

The court of appeals denial of Sierra Club/Angoon's petition for rehearing was summary. It created no precedent, and its impact is thus confined to the four corners of this lawsuit. While the rehearing order may be important to the parties, it is a non-event to those not connected with this controversy, and this court does not "sit for the benefit of the particular litigants." *Rice v. Sioux City Memorial Park Cemetary*, 349 U.S. 70, 74 (1955).

Lastly, this petition presents the worst setting imaginable for reiterating the proper role of the appellate courts in summary judgment matters. On the one hand, the district court proceedings were a procedural morass. *See* n. 4, *ante.* On the other hand, Sierra Club/Angoon, by their choosing, developed a poor record on this matter, so much so that it is of virtually no use in formulating any general principles.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

Case No. A83-234 Civil [CONSOLIDATED]

SIERRA CLUB, INC., *et al.*

Plaintiffs,

v.

SHEE ATIKA, INC., *et al.*,

Defendants.

AFFIDAVIT OF LEWIS F. GORDON

I, Lewis F. Gordon, being duly sworn, depose and say as follows:

1. I am legal counsel for the Sierra Club and the City of Angoon in the above-referenced action. I submit this affidavit pursuant to Federal Rules of Civil Procedure 56(f) in support of Plaintiffs' Reply in Support of Cross Motion for Partial Summary Judgment on EIS Inadequacy Issue filed this same date.

2. Plaintiffs cannot at this time, for reasons stated below, present by affidavit facts essential to justify their opposition to defendants' motion for summary judgment on plaintiffs' claims regarding the inadequacy of the Corps' EIS on the log transfer facility.

3. Plaintiffs have not commenced any discovery on the issue of the inadequacy of the EIS for the following reasons.

4. First, the Corps did not issue its Record of Decision on the 404 permit until February 25, 1985, and the con-

solidated complaint, filed pursuant to court order and raising the issue of the inadequacy of the EIS for the first time, was not filed until April 29, 1985. In this short period of time, plaintiffs' counsel has been extremely busy on other aspects of this litigation, preparing various briefs on subsistence and other issues pursuant to the court's briefing schedules. There has been very little time for preparation of discovery requests and for scheduling and taking depositions.

5. Second, plaintiffs believe that success on their cross motion for partial summary judgment on the inadequate alternatives issue would make further discovery on other NEPA issues unnecessary. In the interest of avoiding potentially unnecessary discovery and litigation costs, plaintiffs have put off discovery until after resolution of their Cross Motion for Partial Summary Judgment re Inadequacy of EIS for Failing to Study Exchange Alternative.

6. Plaintiffs' discovery plan regarding the inadequacy of the EIS would in part include the following: (1) request production of all drafts of the EIS, related documents, and comments submitted; (2) have plaintiffs' experts analyze these materials; (3) take depositions of preparers and commentators, especially representatives of state and local governments; (4) have plaintiffs' experts analyze deposition testimony.

6. Even though formal discovery has not been commenced regarding the inadequacy of the EIS, affidavits previously submitted in this lawsuit by experts and subsistence users regarding the subsistence issues show that there are contested issues of fact with regard to the environmental and subsistence effects of the project. Defendants have admitted that these issues of fact are in dispute. See, e.g., Shee Atika's Supplemental Brief on Subsistence Issues, filed April 18, 1985, at 2, n.2. These affidavits suggest potential triable issues of fact regarding

the adequacy of the EIS which will be further explored during the discovery process.

/s/ LEWIS F. GORDON
LEWIS F. GORDON

SUBSCRIBED AND SWORN to before me this 18th day of June, 1985.

/s/ DEBORAH A. TRAVER
Notary Public in and for Alaska

My commission expires: 8/17/86

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 85-4413
86-3582
86-3617
86-3618

DC# CV-83-234
Alaska (Anchorage)

CITY OF ANGOON, THE SIERRA CLUB, *et al.*,
Plaintiffs-Appellees,

v.

DONALD HODEL, Secretary of Interior, *et al.*,
Defendants,

and

SHEE ATIKA, INC.,
Defendant-Appellant,

and

SEALASKA CORP.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

SIERRA CLUB/ANGOON'S PETITION FOR REHEARING

INTRODUCTION

Appellees Sierra Club, The Wilderness Society, and the City of Angoon ("Sierra Club/Angoon") respectfully

petition for a rehearing of the appeal in the above-entitled cause, pursuant to Rule 40, Federal Rules of Appellate Procedure.

Sierra Club/Angoon believe the Court has overlooked material points of law in rendering its decision. While reserving their argued position as to each of the points of appeal, appellees address themselves in this petition solely to the issue of the propriety of the panel's entry of summary judgment in favor of Shee Atika-Sealaska on the adequacy of the Environmental Impact Statement ("EIS") and the validity of the §404 permit for the log transfer facility ("LTF"). Specifically, appellees believe the Court erred in concluding that there were no genuine issues of material fact remaining in *sua sponte* directing summary judgment for Shee Atika-Sealaska.

SUMMARY OF FACTS

The instant controversy involves three consolidated appeals, resulting in turn from the earlier consolidation of four separate proceedings before the district court. On April 7, 1982, the Army Corps of Engineers ("Corps") issued a Department of the Army permit to Shee Atika, Inc. under §404 of the Clean Water Act and §10 of the Rivers and Harbors Act, authorizing the corporation to build an LTF at Cube Cove "for development of its privately-owned lands on western Admiralty Island." ER at 145.[1] On January 13, 1983 the City of Angoon and 287 individual Natives filed their complaint in *Angoon v. Marsh,* alleging, *inter alia,* that approval of a §404 permit for

[1] In this petition, citations to the defendants' Excerpts of Records are in the following form: ER ____. The Sierra Club and the City of Angoon have filed joint additional Excerpts of Record in two volumes. Volume I contains excerpts from *Angoon v. Marsh,* No. A84-126 Civ. (now part of the instant consolidated action). Excerpts from Volume I are cited in the following form: *Marsh* CR ____, Tab ____. Volume II contains excerpts from *Angoon v. Hodel,* No. A83-234 Civ., which are cited as follows: *Hodel* CR ____, Tab ____.

Shee Atika's LTF at Cube Cove without the preparation of an EIS was in violation of the federal defendants' duties pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4321 *et seq. Marsh* CR 1. On February 28, 1983, Sierra Club and The Wilderness Society intervened as plaintiffs, *Marsh* CR 13, and on March 21, 1983, Angoon and intervenors submitted a motion for preliminary injunction against federal approval of construction of the LTF. *Marsh* CR 20. On March 30, 1983, the federal government stipulated to suspend its earlier approval of the LTF, and to prepare an EIS. *Marsh* CR 28.

On March 22, 1984, Sierra Club/Angoon moved to enjoin construction of the permanent LTF and timber harvesting on 400 acres of the inholding. *Marsh* CR 109. That work had begun even though federal approval was still suspended and the EIS was not yet completed. On March 28, 1984, the court granted a temporary restraining order halting construction of the LTF, but did not enjoin timber harvesting. *Marsh* CR 116. On March 28, 1984, the Corps issued a "Cease and Desist" order directing Shee Atika to halt its illegal fill activities. *Marsh* CR 114.

After expedited briefing and argument in April 1984, the court granted a preliminary injunction against timber harvesting, based on the statutory prohibition in §503(d) of ANILCA ("[w]ithin the Monument[], the Secretary shall not permit the . . . harvesting of timber"). *Marsh* CR 168.

On December 27, 1984, the Ninth Circuit reversed the preliminary injunction. *Angoon v. Marsh,* 749 F.2d 1413 (9th Cir. 1984). The case was remanded to the district court, where *Angoon v. Marsh* was consolidated with *Shee Atika v. Sierra Club I,* No. A83-209, *Shee Atika v. Sierra Club II,* No. A83-234, and *Sierra Club v. Watt,* No. A84-001. The case was renamed *Angoon v. Hodel,* No. A83-234 Civil. *Hodel* CR 58. At that time Shee Atika had pending a motion for summary judgment. This motion did not ad-

dress the validity of the Corps' §404 permit or the adequacy of the EIS.

The Corps' EIS was completed in October, 1984. ER 00136. However, the Corps did not issue its Record of Decision on the §404 permit until February 25, 1985. ER 00325. Soon thereafter, the district court issued an order requiring Sierra Club/Angoon to file a consolidated complaint. This complaint incorporated a new claim that the §404 permit which was issued, or about to be issued, pursuant to the Corps' February 25, 1985 decision was in violation of Sections 101 and 102 of the NEPA. The court further ordered that additional briefing on the existing summary judgment motions be filed within 30 days. (*See* Minute Order, March 4, 1985, *Hodel* CR 58, Exhibit A, attached; ER 00001, 15-16, 19.)

Upon the filing of the consolidated complaint in *Angoon v. Hodel* on April 29, 1985, ER 0001, Shee Atika and the federal defendants moved anew for summary judgment on all claims. ER 00111, 00113. On May 21, 1985, Sierra Club/Angoon filed a cross-motion for Partial Summary Judgment re: inadequacy of EIS for Failing to Study Exchange. ER 00116.[2]

As the foregoing facts demonstrate, the time period between the Corps' final decision and the submission of defendants' consolidated motions for summary judgment on all claims was extremely limited. Moreover, during this time the parties were required to prepare various briefs on subsistence and other issues, pursuant to court order. *Hodel* CR 58, CR 83. For this reason, Sierra Club/Angoon cross-moved for *partial* summary judgment on the limited question of the adequacy of the EIS vis-a-vis its failure to study the alternative of a land exchange, while reserv-

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[2] This cross-motion was subsequently resubmitted by stipulation on June 18, 1985. *Hodel* CR 140.

ing for future consideration other violations of NEPA set forth in plaintiffs' consolidated complaint.

Because of the complicated nature of the case, the number of issues involved, the limited amount of time for discovery following the Corps' issuance of its decision, the possibility that success on plaintiffs' cross-motion for summary judgment would make a lengthy and burdensome consideration by the court of other NEPA issues unnecessary, Sierra Club/Angoon responded to Shee Atika and the federal defendants' motions for summary judgment by stating that complete resolution of all of plaintiffs' claims under NEPA was inappropriate at that time. Sierra Club/Angoon made clear that the adequacy of the EIS in light of the failure to study exchange was only one of plaintiffs' NEPA allegations, and that additional time was needed for discovery so that plaintiffs could fully present their case on these points. (Sierra Club/Angoon's Reply to Motion to Dismiss by Shee Atika and Federal Defendants, May 21, 1985, *Hodel* CR 119. Attached as Exhibit B.) Counsel for Sierra Club/Angoon also submitted an affidavit pursuant to Rule 56(f), Fed.R.Civ.P., requesting additional time to conduct discovery and thus opposing consideration of all EIS-related claims at that time. In support, this affidavit cited the numerous affidavits and admissions already on file which demonstrated the existence of controverted material issues of fact. (Plaintiffs' Reply In Support of Cross-Motion Summary Judgment on EIS Inadequacy Issue. Affidavit of Lewis F. Gordon, June 18, 1985, *Hodel* CR 143. Attached as Exhibit C.) Because the district court granted plaintiffs' cross-motion for partial summary judgment, counsel's 56(f) affidavit and the other claims to which it related were never ruled upon below. *See* ER 00045, 00053-65; *Hodel* CR 146.

ARGUMENT

In reviewing the grant or denial of summary judgment, the appellate court is faced with the same task and gov-

erned by the same standard as that before the district court. *Jewel Companies v. Pay Less Drug Stores Northwest,* 741 F.2d 1555, 1559 (9th Cir. 1984). The court must determine, "on the basis of the pleadings, affidavits, depositions and other evidence available at the time the motion was made," whether there are any genuine issues of material fact and whether either party is entitled to prevail as a matter of law. *Jewel,* 741 F.2d at 1559; Fed.R.Civ.P. 56(c). The appellate court's review is to be *de novo* (*State of Alaska v. United States,* 754 F.2d 851, 853 (9th Cir. 1985), *cert. denied,* 016 S.Ct. 333 (1985); *Callahan v. Woods,* 736 F.2d 1269, 1272 (9th Cir. 1984)), and all evidence, facts, and inferences that can be drawn from the depositions, admissions, and affidavits on file must be viewed in the light most favorable to the party opposing summary judgment (*Aronsen v. Crown Zellerbach,* 662 F.2d 584, 591 (9th Cir. 1981), *cert. denied,* 459 U.S. 1200 (1983); *Spectrum Financial Companies v. Marconsult, Inc.,* 608 F.2d 377, 380 (9th Cir. 1979), *cert. denied,* 466 U.S. 936 (1980)).

As Judge Sneed has previously noted, the granting of summary judgment is appropriate only where there is *no* genuine issue as to any material fact. *Hutchinson v. United States,* 677 F.2d 1322, 1325 (9th Cir. 1982). In making this determination, the court has a duty to consider the record as a whole (*John v. State of Louisiana,* 757 F.2d 698, 711-712 (5th Cir. 1985)) including documentary evidence previously submitted to the court (*Friends of the Earth v. Facet Enterprises, Inc.,* 618 F.Supp. 532, 535 (D.N.Y. 1984)). The appellate court, like the trial court, is precluded from resolving factual disputes on motion for summary judgment (*New York Life Insurance Co. v. Baum,* 707 F.2d 870, 871-72 (5th Cir. 1983)), and cannot "weigh the evidence, pass upon credibility, or speculate as to the ultimate findings of fact" (*Aronsen,* 662 F.2d at 591). Rather the court must resolve all doubts in favor of the party opposing summary judgment (*F.S. Smithers & Co.,*

Inc. v. Federal Insurance Company, 631 F.2d 1364, 1366 (9th Cir. 1980)), including doubts about the existence of a genuine issue of material fact (*Hector v. Wiens,* 533 F.2d 429, 432 (9th Cir. 1976) (citing Moore's *Federal Practice* ¶56.15(3) (1974) and citations therein)). *See also Lemelson v. TWR, Inc.,* 760 F.2d 1254, 1260-61 (Fed.Cir. 1985).

Under these well-established principles, the granting of summary judgment for Shee Atika-Sealaska on the adequacy of the EIS and the validity of the §404 permit for the Cube Cove LTS was improper. In light of the procedural posture of the case, as discussed above, it becomes clear that upon reversing the district court's grant of summary judgment for Sierra Club/Angoon, the appellate court erred in failing to remand the case for further proceedings necessary to resolve the issues remaining.

Under 28 U.S.C. §2106, appellate courts are granted broad powers to dispose of a case upon appeal. *MGPC, Inc. v. Dept. of Energy,* 763 F.2d 422, 433-34 (TECA 1985), *cert. denied,* 106 S.Ct. 76 (1985). Despite the fact that a party may not have moved for summary judgment in the court below, §2106's broad grant of authority allows an appellate court to direct the entry of summary judgment in favor of a non-moving party when justice requires. *Id.; Martinez v. United States,* 669 F.2d 568, 570 (9th Cir. 1982); *MGPC,* 763 F.2d at 434. The exercise of this power, however, is appropriate "only in the rare case" (*E. C. Ernest, Inc. v. General Motors Corp.*, 537 F.2d 105, 109 (5th Cir. 1976)), "since such a determination is best left to the trial court. . . ." (*MGPC,* 763 F.2d at 434). Entry of summary judgment by an appellate court is therefore appropriate only "when it would be just under the circumstances" (*id.*), such as when "it is very clear that all material facts are before the reviewing court" (*Ernst,* 537 F.2d at 109), and no purpose would be served by remanding the issue to the district court (*Shaw v. FBI,* 749 F.2d 58, 63 (D.C. Cir. 1984)). This is not such a case.

As Judge Sneed has cautioned, "[w]e are mindful too that summary judgment procedures should be used with care and restraint." *Hutchinson,* 677 F.2d at 1325. This caution is apt, because "the court must keep in mind that the entry of summary judgment terminates the litigation, or an aspect thereof" (*Jones v. Howe Military School,* 604 F.Supp. 122, 124 (D.Ind. 1984)), and "an improvident grant may deny a party a chance to prove a worthy case" (*Lemelson,* 760 F.2d at 1260 (quoting *D.L. Auld Co. v. Chroma Graphics Corp.*, 714 F.2d 1144, 1146 (Fed. Cir. 1983))).

Thus, entry of summary judgment by the appellate court should occur only when it is absolutely clear that there are no genuine issues of fact and the parties have had a full and fair opportunity to raise disputed issues of fact, counter the evidence submitted by an adversary, and present their case. *MGPC,* 763 F.2d at 434; *Callahan,* 736 F.2d at 1275; *Martinez,* 669 F.2d at 570; *Ithaca College v. N.L.R.B.*, 623 F.2d 224, 229 (2d Cir. 1980) (quoting 6 Moore's *Federal Practice* ¶56.12 at 334 (1976)), *cert. denied,* 449 U.S. 975 (1980); *Ernst,* 537 F.2d at 109. Where there are issues most properly left to the trial court, the appropriate course is to reverse the entry of summary judgment and remand the matter to the district court for further proceedings. *Jewel Companies,* 741 F.2d at 1567; *Callahan,* 736 F.2d at 1269; *Suskind v. North American Life & Casualty Co.*, 607 F.2d 76, 84 (3rd Cir. 1979). *See e.g., Grazing Fields Farm v. Goldschmidt,* 626 F.2d 1068, 1075 (1st Cir. 1980) (district court is in better position to examine sufficiency of EIS with aid, if necessary, of further briefs).

These principles are no less applicable where the parties have filed cross-motions for summary judgment. *See Smithers,* 631 F.2d at 1366 (in case involving cross-motions for summary judgment, Ninth Circuit states that moving party must demonstrate absence of issues of material fact and entitlement to judgment as matter of law, with evidence and inferences viewed favorably to opposing party and all

doubts resolved in opposing party's favor); *Callahan,* 736 F.2d at 1275 (in case involving cross-motions for summary judgment, Ninth Circuit declines to grant summary judgment for appellate because appellee would be unfairly deprived of opportunity to present pertinent evidence). Although for purposes of his or her own motion for summary judgment a party may submit an affidavit stating that there are no disputed issues of fact and that summary judgment should be granted, this admission applies only to the legal theory on which the party has submitted such motion, but does not constitute a waiver of the party's right to raise disputed issues of fact with regard to an adversary's contentions:

> "A party moving for summary judgment . . . may make certain concessions in favor of his adversary for the purposes of the motion that do not carry over and support summary judgment for the adversary."

Ernst, 537 F.2d at 109 (quoting Moore, 6 *Federal Practice* ¶56.12 at 56-337 (1976). *See also John,* 757 F.2d at 705; 10A Wright, Miller and Kane, *Federal Practice and Procedure,* Civil, §2720 at 20-22 (1983).

Thus, the court, whether at the trial or appellate level, must review each party's motion independently and determine whether the party has met the strict burden of demonstrating that there are no disputed issues of material fact and that judgment is appropriate on those claims as a matter of law. *United States v. Fred A. Arnold, Inc.,* 573 F.2d 605, 606 (9th Cir. 1978); *Lee v. Dayton Power and Light Co.,* 604 F.Supp. 987, 993 (D.Ohio 1985); *District 12, United Mine Workers of America v. Peabody Coal Co.,* 602 F.Supp. 240, 242 (D.Ill. 1985). The court must take care to ensure that in considering cross-motions for summary judgment, one or the other of the parties is not deprived of its opportunity to be heard on other issues. *Levine v. Fairleigh Dickinson University,* 646 F.2d 825

(3d Cir. 1981). In reversing a lower court's grant of summary judgment, the appellate court must therefore decline to enter summary judgment for the opposing party if a genuine issue of fact exists (*John,* 757 F.2d at 705; *Fred A. Arnold,* 573 F.2d at 606), and should instead remand the case for resolution of those issues which the district court did not pass upon in its initial determination (*Hettleman v. Bergland,* 642 F.2d 63, 68 (4th Cir. 1981); *Grazing Fields,* 626 F.2d at 1074-75; *Connolly v. Pension Benefit Guaranty Corp.,* 581 F.2d 729, 734-35 (9th Cir. 1978), *cert. denied,* 440 U.S. 935 (1979)).

The principles outlined above are particularly applicable here. In moving for partial summary judgment, plaintiffs Sierra Club/Angoon specifically limited their motion to consideration of whether the Corps was required to study a land exchange as a reasonable alternative to the LTF and related harvesting. If, as eventually happened, that motion was granted, a complicated trial on other NEPA issues, requiring the testimony of expert witnesses, could be avoided, and both the court and the parties could be saved considerable, and avoidable, delay and expense.

As stated both in their response to defendants' consolidated motions for summary judgment (*see* Exhibit B) and in the affidavit submitted pursuant to Rule 56(f) (*see* Exhibit C), plaintiffs believed that substantial factual disputes relating to their other NEPA claims existed, but because of the limited time for discovery, they were unable to fully document these facts in opposition to defendants' motions. Plaintiffs also noted that genuine issues of material fact were raised by the affidavits previously submitted with regard to earlier stages of the proceeding. As noted above, the court must make a determination of whether a genuine issue of fact exists of the basis of the record as a whole (*John,* 757 F.2d at 711-12), and documentary evidence already in the record is to be considered (*Friends of the Earth,* 618 F.Supp. at 535). Plaintiffs' declarations, together with the surrounding circumstances, compel the

conclusion that genuine issues of fact existed concerning the validity under NEPA of Shee Atika's §404 permit for reasons other than the EIS' failure to study the exchange alternative, and the awarding of summary judgment in favor of Shee-Atika-Sealaska was therefore inappropriate.

As previously discussed, summary judgment procedures must be used cautiously, so as not to deprive a party of a fair opportunity to be heard. *Hutchinson,* 677 F.2d at 1325. *See Fountain v. Filson,* 336 U.S. 681 (1949) (*sua sponte* entry of summary judgment by court of appeals was error, because it deprived party against whom judgment was entered opportunity to dispute facts material to that claim). For this reason, the Federal Rules allow for situations, such as that presented here, where additional time is needed in order to allow the opposing party a fair opportunity to present its case. *Alghanim v. Boeing Company,* 477 F.2d 143, 148 (9th Cir. 1973); *Argus Inc. v. Eastman Kodak Co.,* 552 F.Supp. 589, 600 (D.N.Y. 1982).

> "The purpose of the rule is to prevent premature grants of summary judgment in cases where, given adequate time to obtain discoverable material from the moving party, the party opposing the motion might be able to establish genuine issues of fact which would preclude summary judgment." (*McVan v. Bolco Athletic Co.,* 600 F.Supp. 375, 378 (D.Pa. 1984).)

As with other affidavits submitted in opposition to a motion for summary judgment, an affidavit submitted pursuant to Rule 56(f) "should be treated liberally" (*Patty Precision v. Brown & Sharpe Manufacturing Co.,* 742 F.2d 1260, 1264 (10th Cir. 1984)), and appropriate relief (either a continuance or denial of the summary judgment motion) should be granted "almost as a matter of course" (*McVan,* 600 F.Supp. at 378 (quoting *Ward v. United States,* 471 F.2d 667, 670 (3rd Cir. 1973)); *Costlow v. United States,* 552 F.2d 560, 563-64 (3rd Cir. 1977)).

> "Further, as an additional precaution against denying a party its chance to prove a worthy case, any doubt as to the presence or absence of disputed issues of material fact must be resolved in favor of the presence of disputed issues, or in other words in favor of the party opposing summary judgment." (*Lemelson,* 760 F.2d at 1261 (citations omitted); *Hector v. Weins,* 533 F.2d 429, 432 (9th Cir. 1976); *Doff v. Brunswick Corp.,* 372 F.2d 801, 804 (9th Cir. 1967), *cert. denied,* 389 U.S. 820.)

Without an opportunity to gather relevant information through discovery, or at the very least to submit affidavits presenting such disputed facts as can be established by the information already on hand, Sierra Club/Angoon will have been deprived of their opportunity to be heard. It is important to note that plaintiffs were given no notice of the fact that the appellate court intended to issue a final ruling on *all* NEPA claims. *See Yashon v. Gregory,* 737 F.2d 547, 552 (6th Cir. 1984) (court must afford party against whom *sua sponte* summary judgment is to be entered notice and opportunity to respond). Pertinent facts and legal arguments pertaining to other defects in the Corps' EIS and resulting §404 permit were neither presented in the parties' briefs nor argued before the panel. Both Sealaska and the Federal Defendants stated in their opening briefs that the question presented was whether the EIS was required to give detailed consideration to the alternative of exchange and the parties' NEPA appeals were clearly based only on that part of the district court's Nov. 27, 1985 ruling prohibiting issuance of a permit for construction of the LTF until the exchange alternative was explored. While Shee Atika's statement of the issues is somewhat convoluted, Shee Atika's briefs deal only with the exchange alternative issue. The Court's misunderstanding about the existence of disputed facts is perhaps understandable, however, because of the misleading statements

put forth by Shee Atika. For instance, in its Opening Brief at 13 Shee Atika states (erroneously) that "[t]he only contention advanced by Sierra Club was that the Corps had violated NEPA by not conducting an in-depth study of exchange. Sierra Club did not challenge in any manner the environmental findings of the Corps." Opening Brief For Shee Atika, Inc., Excerpts Attached as Exhibit D. In its brief, Shee Atika repeatedly refers to "dispositive motions" submitted by the parties. This misleading characterization of the facts with likewise presented to the Court in Shee Atika's December 16, 1985 Motion for Summary Reversal, in which Shee Atika alleged to the Court that "the *only* dispute concerning the legal adequacy of the EIS is whether it sufficiently addressed the alternative of an off-island exchange." Attached as Exhibit E.; emphasis in original.

As this Court has noted, "[I]n passing upon requests for additional time to respond to a motion for summary judgment . . . the absolute right of a party to respond, must be taken into consideration." *Alghanim,* 477 F.2d at 148. Here Sierra Club/Angoon have not been granted a fair opportunity to respond. Because the district court granted plaintiffs' cross-motion for summary judgment, thus invalidating the Corps' EIS, the Rule 56(f) motion was never passed upon. The district court thus never had the opportunity to exercise the discretion appropriately entrusted to it when a party files an affidavit under Rule 56(f) (*Patty Precision,* 742 F.2d at 1264-65), and plaintiffs were deprived of their entitlement of a ruling on their objection before the court disposed of the entire case (*Yashon,* 737 F.2d at 552-53). "Even if the plaintiff were incorrect in arguing that the record was insufficient, he was entitled to be so informed in order that he might respond the the district court's proposal to grant summary judgment with whatever arguments and evidence in the record that he could muster." *Id.* at 552; *Costlow,* 552 F.2d at 564. Without the benefit of either additional evi-

dence that could be presented upon further discovery or submission of a formal response based on the evidence the party opposing summary judgment already has, the court is hampered in its ability to determine that summary judgment is truly appropriate. *MGPC,* 763 F.2d at 428; *Sharlitt v. Gorinstein,* 535 F.2d 282, 283-84 (5th Cir. 1976); *Macklin v. Butler,* 553 F.2d 525, 528 (7th Cir. 1977).

CONCLUSION

Almost thirty years ago the Supreme Court cautioned that parties facing a *sua sponte* grant of summary judgment must be given an opportunity to dispute the facts and present their case. *See Fountain v. Filson,* 336 U.S. 681 (1949). In more recent times, the court of appeal have noted that a party should not be required "to needlessly confuse the issues of a case and additional burdens to the workload of the trial court when the correct disposition of the matter merely requires the court to rule on the motions pending before it." *Patty Precision,* 742 F.2d at 1265. Here plaintiffs properly tendered their objection to final disposition on their NEPA claims without the benefit of further time for discovery. Their allegations of disputed issues of facts must be treated liberally and all doubts must be resolved in their favor. The court below has neither passed on this objection nor afforded plaintiffs an opportunity to make such arguments as they might. Evidence already in the record demonstrates that material issues of fact are disputed by the parties. Arguments pertaining to other aspects of the parties' compliance with NEPA were not briefed or argued before this Court. For all of the foregoing reasons, the entry of summary judgment for Shee Atika-Sealaska on the validity of the EIS and the §404 permit for the LTF was in error, and the case should be remanded to the district court for trial on the issues remaining.

Respectfully submitted,

FURTH, FAHRNER, BLUEMLE & MASON
SIERRA CLUB LEGAL DEFENSE FUND

DATED: November 19, 1986 By /s/ JEFFREY A. GLICK
JEFFREY A. GLICK

DATED: November 19, 1986 By /s/ DURWOOD J. ZALKE
DURWOOD J. ZALKE